

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PLUTARCO ANGULO-AGUIRE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

CASE No. 16-cv-04523(cm)
07-cr-387(cm)

EVIDENTIARY HEARING REQUESTED

MOTION FOR RECONSIDERATION PURSUANT
TO RULE 59(e) OF THE FEDERAL RULES OF
CIVIL PROCEDURE

COMES NOW, Petitioner, Plutarco Angulo-Aguire, pro se, respectfully requesting that this Honorable Court reconsider its order entered on December 10, 2019, denying relief requested under Title 28 U.S.C. §2255. The Petitioner brings such request pursuant to Rule 59(e) of the Federal Rules of Civil Procedure ("Fed. R.Civ.P"). In this court's December 10, 2019, order, this court found that Hobbs Act Robbery under Title 18 U.S.C. §1951(a) categorically qualifies as a "crime of violence" under the elements clause of 18 U.S.C. §924(c)(3)(A). see United States v. Hill, 890 F.3d 51 (2d cir. 2018).

1/7/2020 **MEMO ENDORSED**

Motion for reconsideration pursuant to Rule 59 is DENIED. BECAUSE Petitioner has not made a substantial showing of denial of a constitutional right, a certificate of appealability will NOT issue. U.S. v Perez, 129 F.3d 255, 260 (2nd Cir. 1997). The Court further finds, pursuant to 28 U.S.C. 1915(a)(3), that an appeal from this order would not be taken in good faith. See Coppedge v. U.S., 369 U.S. 438, 82 (1962)

In Hill, the court explained, "using the so-called 'category approach', 18 U.S.C. §1951(b)(1)'s requirement that the defendant commit robbery by means of 'actual or threatened force, violence, or fear of injury' qualifies the offense as one which has 'as an element the use, attempted use, or threatened use of physical force against the person or property of another.'" Hill, 890 F.3d at 57-60, citing 18 U.S.C. §924(c)(3)(A). That is not so, where the court failed to examine each element of §1951(b)(1) independently. see United States v. Chea, 2019 U.S. Dist. LEXIS 177651 (N.D. Cal. Oct. 2, 2019)(holding that in conducting a categorical approach, the "fear of injury, immediate or future, to his person or property" provision of §1951(b)(1) is not a "crime of violence" as defined in §924(C)(3)(A)).

In Johnson v. United States, 559 U.S. 133 (2010), the Supreme Court defined "violent felony" as a crime which requires the use of "violent force—that is, force capable of causing physical pain or injury to another person. Johnson, 559 U.S. at 140. The Petitioner asserts that the element of robbery within §1951(b)(1) does not fall under "violent felony" definition as outlined in Johnson. That is because, Subsection (b)(1) of §1951 defines "robbery as follows:

The term 'robbery' means the unlawful taking or obtaining of person property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody

or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

The elements clause of §924(c)(3) define a "crime of violence" as an offense that is a felony and "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. §924(c)(3)(A). Because the term "robbery" as defined in §1951(b)(1), is broad enough to cover the conduct of "obtaining" personal property by "fear or injury, immediate or future, to ones persons or property." Such offense falls outside the definition of a "crime of violence" as held in Johnson, see e.g., United States v. Chea, 2019 U.S. Dist. LEXIS 177651 (N.D. Cal. Oct. 2, 2019).

In conducting a categorical approach, the Chea court found that Hobbs Act robbery under 1951(a) was not a "crime of violence" because the term, "fear of injury, immediate or future, to ones person or property," does not require the use or threat of violent physical force as required by Johnson. Id., citing Ratzlaf v. United States, 510 U.S. 135, 140-41 (1994) ("Judges should hesitate...to treat statutory terms [as surplusage] in any setting, and resistance should be heightened when the words describe an element of a criminal offense"); Duncan v. Walker, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible to every clause and word of a statute"). Thus, if Congress had intended for "fear of injury,

immediate or future" in §1951(b)(1), to mean "fear of violence or violent force", it could have said so expressly. It did not and no court can interpret such to mean so at this time.

Further, §1951(a) cannot be said to state a "violent felony" as defined by Johnson. Where nothing in the plain language of §1951(b)(1) suggest that the "property" that the victim fears could be injured needs to be in the victim's physical custody or possession, or even proximity at the time the Hobbs Act robbery is committed. This is an very important factor to be considered, because such preempts any argument that the fear of injury to property necessarily involves fear of injury to the victim (or another person) by virtue of the property's proximity to the victim or another person. United States v. Camp, 903 F.3d 594, 602 (6th cir. 2018)(noting that Hobbs Act robbery can be committed by "threats to property alone" and that such threats "Whether immediate or future-do not necessarily create a danger to the person"); United States v. Bowen, No. 17-1011, ___ F.3d ___ 2019, WL 4146452, at *8 (10th cir. Sept. 3, 2019)(holding that crimes against property are not "crimes of violence" as defined under Johnson). As a result, Hobbs Act robbery is not a "crime of violence" under §924(c)(3)(A).

Finally, Petitioner asserts that because Hobbs Act robbery under §1951(a) is so ambiguous, this court should conclude that the rule of linity will preclude such offense be considered as a "crime of violence" under the elements clause of §924(c)(3). Chea, at n.18

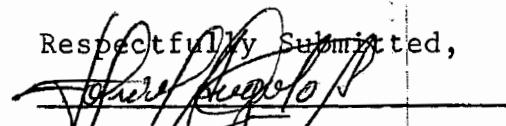
(finding that the rule of lenity requires all ambiguity in 1951(a) to be construed in Chea's favor) citing United States v. Edling, 895 F.3d 1153, 1158 (9th cir. 2018) ("The rule of lenity 'instructs that, where a statute is ambiguous, courts should not interpret the statute so as to increase the penalty that it places on the defendant").

Thus, the Petitioner asserts that reconsideration should be granted, so that a categorical approach could be applied to determine whether "robbery" as defined in §1951(b)(1), constitutes a "crime of violence" under the elements clause of §924(c)(3)(A), for the reasons stated above. As an additional matter, this court should find that reconsideration should be granted, in order to determine whether the "fear of injury, immediate or future" provision of §1951(b)(1) is so ambiguous. Such offense from being considered a "crime of violence", due to the ambiguity in the offense's definition.

CONCLUSION

WHEREFORE, Petitioner prays that based on the forgoing, that reconsideration is granted.

Respectfully Submitted,

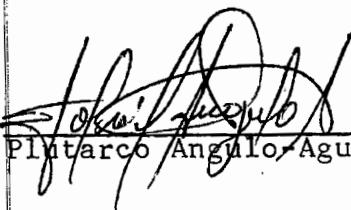


Plutarco Angulo-Aguirre
Reg. No. 26954-077
Federal Correctional Complex
P.O. Box 1032/Med
Coleman, FL 33521-1032

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing motion has been sent on this day of December, 23 2019, via United States Postal Service to the party listed below:

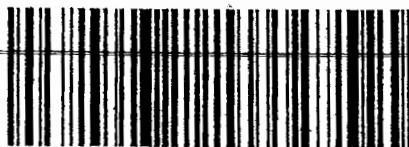
Denielle M. Kudla, AUSA
The Silvio J. Mollo Building
1st. Andrew's Plaza
New York, New York 10007


Plutarco Angulo Aguirre

Plutarco Angulo-Aguirre 26954-077 (C-2)
Federal Correctional Complex-Med.
P.O. Box 1032
Coleman, Florida 33521

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Pro Se Intake

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